

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

**CLYDE M. SINGLETON and
TRACY D. SINGLETON,**

Plaintiffs,

v.

**CIVIL ACTION NO. 3:07-CV-66
(BAILEY)**

NVR, INC., dba Ryan Homes,

Defendant.

**ORDER GRANTING MOTION TO AMEND COMPLAINT AND
GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION
TO DISMISS COUNTS I, VI, VII AND VIII OF PLAINTIFFS' COMPLAINT**

Pending before this Court are Defendant's FRCP 12(b)(6) Motion to Dismiss Counts I, VI, VII, and VIII of Plaintiffs' Complaint (Doc. 6), filed by defendant NVR, Inc. (hereinafter "NVR"), as well as Plaintiffs' Motion to Amend Complaint (Doc. 12).

In its motion to dismiss, NVR argues that Count I of the Complaint (Temporary and Permanent Nuisance) fails to allege any facts indicating that NVR unreasonably used its property in such a manner as to impair plaintiffs' rights. In light of the fact that the plaintiffs have sought leave to amend their complaint to assert additional facts to support their claims, that portion of the motion to dismiss (Doc. 6) seeking dismissal of Count I is **DENIED**, without prejudice to the defendant reasserting the motion after the amended complaint is filed.

Plaintiffs' motion to amend their complaint (Doc. 12) is **GRANTED** insofar as the motion deals with Count I of the complaint.

Count VI (Diminution of Market Value of Property), Count VII (Loss of Use and

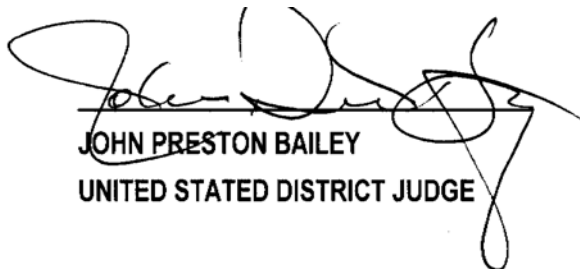
Enjoyment of Property), and Count VIII (Loss of Personal Property) each deal with elements of damage. None of these counts of the complaint assert a viable independent cause of action. Rather, each asserts an item of damage that may be awarded under such claims as nuisance, negligence, or other counts of the complaint. See ***Burch v. Nedpower Mount Strom, LLC***, ___ W.Va. ___, ___ S.E.2d ___, 2007 WL 1660798 (June 8, 2007); ***Carbasho v. Musulin***, 217 S.E.2d 359, 618 S.E.2d 368 (2005); ***Buda v. Town of Masontown***, 217 W.Va. 284, 617 S.E.2d 831 (2005); ***Carter v. Monsanto Co.***, 212 W.Va. 732, 575 S.E.2d 342 (2002); ***Ellis v. King***, 184 W.Va. 227, 400 S.E.2d 235 (1990).

Accordingly, Defendant's Motion to Dismiss (Doc. 6) is **GRANTED IN PART**. Counts VI, VII and VIII are **DISMISSED**. Such dismissal, however, will not prevent the assertion of these elements of damage under any viable counts of the complaint.

It is so **ORDERED**.

The Clerk is hereby directed to transmit copies of this Order to counsel of record herein.

DATED: August 15, 2007.


JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE